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IN THE

Supreme Court of the United States

October Term, 1962

No. 217

JOSEPHINE GOSS, et al.,

Petitioners,

v.

THE BOARD OF EDUCATION OF THE CITY OF KNOXVILLE, TENNESSEE, et al.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONERS' BRIEF

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Opinions Below

1. *Goss* case. The memorandum opinion of the United States District Court for the Eastern District of Tennessee (R. 119) is reported at 186 F. Supp. 559. The opinion of the United States Court of Appeals for the Sixth Circuit (R. 157) is reported in 301 F. 2d 164 (6th Cir. 1962).

2. *Maxwell* case. The first Findings of Fact, Conclusions of Law and Judgment of the United States District Court for the Middle District of Tennessee (R. 228) is reported at 203 F. Supp. 768. The second Findings of Fact, Conclusions of Law and Judgment of that court (R. 269) is unreported. The opinion of the United States Court of Ap-

peals for the Sixth Circuit (R. 282) is reported in 301 F. 2d 828 (6th Cir. 1962).

Jurisdiction

The judgment of the Court of Appeals in the *Goss* case was entered on April 3, 1962 (R. 156). The judgment of the Court of Appeals in the *Maxwell* case was entered on April 4, 1962 (R. 281). The petition for certiorari was filed June 29, 1962, and was granted October 8, 1962, limited to Question 1 presented by the petition. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

Question Presented

Whether petitioners, Negro school children seeking desegregation of the public school systems of Knoxville, Tennessee (*Goss* case), and Davidson County, Tennessee (*Maxwell* case), are deprived of rights under the Fourteenth Amendment by judicial approval of a provision in desegregation plans adopted by their local school boards, which expressly recognizes race as a ground for transfer between schools in circumstances where such transfers operate to preserve the pre-existing racially segregated system, and which operate to restrict Negroes living in the zones of all-Negro schools to such schools while permitting white children in such areas to transfer to other schools solely on the basis of race.

Constitutional Provision Involved

This case involves Section 1 of the Fourteenth Amendment to the Constitution of the United States.

Statement

These two cases involve the desegregation of the public schools of the City of Knoxville, Tennessee, and of Davidson County, Tennessee, an area adjacent to the City of Nashville.

The cases were brought by Negro public school pupils and their parents as class actions under Rule 23(a)(3), F. R. C. P., against the local school authorities seeking injunctive and declaratory relief to obtain desegregation in accordance with *Brown* v. *Board of Education*, 347 U. S. 483; 349 U. S. 294.[1] In each case, jurisdiction of the District Court was invoked pursuant to 28 U. S. C., §§ 1331, 1343, 2201 and 2202, and 42 U. S. C., §§ 1981 and 1983, the cases involving alleged denials of rights under the Fourteenth Amendment. In both cases the school authorities acknowledged by their answers that they were continuing to operate racially segregated public school systems. After directions from the trial courts to present desegregation plans (R. 29, 208), both boards adopted plans to desegregate one school grade each year over a twelve year period, beginning with the first grade, in 1960 in Knoxville and in 1961 in Davidson County. (For text of plans see: R. 30, 214.) While there were differences in wording, the two plans were substantially the same. Both contained provisions for rezoning of schools without reference to race, and for a system of transfers.

The transfer rule, which is at issue on this petition, provided that pupils could obtain transfers from the schools in their zones of residence to other schools upon request in certain cases. The Knoxville plan provided:

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[1] The *Goss* case was filed December 11, 1959 in the District Court for the Eastern District of Tennessee (R. 5). *Maxwell* was filed September 19, 1960 in the Middle District of Tennessee (R. 165).

6. The following will be regarded as some of conditions to support requests for transfer:

   a. When a white student would otherwise be required to attend a school previously serving colored students only;

   b. When a colored student would otherwise be required to attend a school previously serving white students only;

   c. When a student would otherwise be required to attend a school where the majority of students of that school or in his or her grade are of a different rate (R. 31-32).

The transfer rule adopted by Davidson County was the same except for one or two words not affecting the meaning, e.g., in the introductory clause the words "valid conditions for requesting transfer" are used instead of "valid conditions to support requests for transfer" as in the *Goss* case (R. 214-215). Both plans also contained similar general language that transfers would be granted when "good cause" is shown.[2]

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[2] The Knoxville Plan provided (R. 31):

"5. Requests for transfer of students in desegregated grades from the school of their Zone to another school will be given full consideration and will be granted when made in writing by parents or guardians or those acting in the position of parents, when good cause therefor is shown and when transfer is practicable, consistent with sound school administration."

The Davidson County Plan provided (R. 214):

"4. Application for transfer of first grade students, and subsequent grades according to the gradual plan, from the school of their zone to another school will be given careful consideration and will be granted when made in writing by parents, guardians, or those acting in the position of parents, when good cause therefor is shown and when transfer is practicable and consistent with sound school administration."

Plaintiffs filed written objections to both plans including specific objections to the above-quoted transfer rule (R. 32-34, 215-219). The District Courts in both cases held hearings to consider the adequacy of the plans at which the parties presented evidence.

In the *Goss* case, the District Court found the plan acceptable and approved it in all respects, except that it required the school board to re-study and re-submit a plan relating to an all-white vocational school offering technical courses not available to Negro students. On plaintiffs' appeal to the Sixth Circuit in the *Goss* case, the Court of Appeals modified this judgment "insofar as it approved the board's plan for continued segregation of all grades not reached by its grade a year plan," and remanded, instructing the District Court "to require the board to promptly submit an amended and realistic plan for the acceleration of desegregation" (301 F. 2d at 169). Thus, the Court sustained one of plaintiffs' arguments saying the "evidence does not indicate that the board is confronted with the type of administrative problems contemplated by the Supreme Court in the second *Brown* decision" (301 F. 2d at 167). The court affirmed the approval of the plan as to the other features, including the transfer provision, stating that this approval was "subject to it being used for proper school administrative purposes and not for perpetuation of segregation" (301 F. 2d at 168).

In the *Maxwell* case the District Court disapproved the school board's twelve year plan and modified it to require that the first four grades be desegregated as of January 1, 1961, with an additional grade to be desegregated each September thereafter until all grades were covered. The District Court approved the racial transfer provision and also refused injunctive relief to several plaintiffs who sought admission to white schools nearer their homes as

exceptions to the plan in higher grades that were still segregated. On plaintiffs' appeal involving these last mentioned two issues, the Sixth Circuit affirmed the approval of the transfer plan and the denial of injunctive relief as to three plaintiffs who sought individual admissions.

Evidence and Holdings:

***Goss* Case**

The major part of the testimony in the record relates to the issue presented by the request for a twelve year delay in desegregation, and since no review of the Sixth Circuit's action on this matter is sought, this factual summary is limited to matters bearing on the transfer plan. The evidence touching on the transfer plan consisted of testimony by school board members as to its meaning, their understanding of its likely effect, and the reasons for the plan. There was also testimony by a school administrator as to prior transfer procedures, and several affidavits and exhibits were filed by plaintiffs in support of their motion for new trial which reflect school board action establishing transfer procedures after the trial court's approval of the plan.

The school board president, Dr. Burkhart, testified that the provision for transfers based on race was adopted out of concern for "the orderly education of our students, both white and colored, in an effort to make available to the community the best facilities and instructional facilities that we can under the least possible circumstance which might be harmful" (R. 85); that the board thought it might be "harmful" to a certain number of white students to go to school with Negroes and also "it might be harmful to some of the colored students to go with white students

if they did not want to" (R. 85). He said the basis for this feeling was:

> The fact that we are talking about two separate races of people, with different physical characteristics, who have not in our community been very closely associated in many ways, and certainly not in school ways. And there would be a sudden throwing together of these two races which are not accustomed to that sort of thing. Either one of them might suffer from it unless we took some steps to try to decrease that amount of suffering or that contact which might lead to that in case it did occur (R. 86).

The witness stated that he did not necessarily refer to physical harm but was more concerned with "mental harm" (R. 86). With regard to the expected operation of the transfer rule, the school board president testified that he did not know the mechanics as to how pupils would be notified of their new school zones (R. 91-92). He further testified:

> Q I am asking you do you or does the board anticipate that any white students will remain in schools which have been previously zoned or used for Negroes exclusively? A. We doubt that they will.
>
> Q. As a matter of fact, none have remained in the City of Nashville, have they? A. I don't know. All I can do to keep up with the City of Knoxville.
>
> Q. So then a Negro student who happens to be in a zone where the school for his zone is a school which was formerly used by Negroes only, that school will be continued to be used for Negroes only and he will remain in a segregated school, will he not? A. Yes, sir.
>
> Q. And if he applied for transfer out of his zone to a school which had been formerly serving white students only, then his application would be denied under

this plan, would it not, sir? A. Unless it were based on one of the other reasons that we have established for transfer. If transferred under one of those, it would be granted.

* * * * *

Q. But a white student to transfer out of a Negro school, as you have stated, would be entitled to do so, to have his application granted as a matter of course under paragraph 6, subparagraph "a" or "c" of this plan? A. Yes, sir (R. 93-94).

Another board member, Dr. Moffett, acknowledged that the transfer provisions "at least give the opportunity" to perpetuate segregation insofar as they are availed of by the students or parents (R. 108).

Mr. Marable, a school administrator in charge of handling transfer requests, stated that under the system used before this plan was approved, when parents request transfers he investigates the requests and gets the views of the principals concerned and determines if the family has a "valid reason" (R. 115); that the school board "leaves that up to me," (*Ibid.*); that he did not know what the board's written rules on transfer provided (R. 115-116); that "I just know I have handled it so many years on my own, and so far I haven't stuck my neck out on it" (R. 116); "that each case is individual. That has to be handled that way. Could not have a rule" (R. 116); that an example of a "valid" reason would be where a child's mother taught at a school and wanted the child with her because she had nowhere to leave it and the school had room and the principal agreed (R. 116-117); that generally transfers were granted for "hardship cases and convenience" (R. 117).

After the trial court approved the plan, the school board adopted a resolution providing for administration of the

provisions as follows: "All first grade pupils should either enroll in the elementary school within their new school zone or in the school which they would have previously attended" (R. 141).

The District Court opinion did not discuss the transfer plan issue in its memorandum opinion, although during the trial the court indicated that it regarded itself as bound by the Sixth Circuit's prior approval of an almost identical provision in the Nashville, Tennessee school case (R. 94). See *Kelley* v. *Board of Education of Nashville*, 270 F. 2d 209, 228 (6th Cir. 1959).

The Court of Appeals' holding with respect to the transfer plan in the *Goss* case was as follows (R. 162):

> The transfer feature of the plan comes under sharp criticism of the plaintiffs. They claim that the operation of such a plan will perpetuate segregation. We do not think the transfer provision is in and of itself illegal or unconstitutional. It is the use and application of it that may become a violation of constitutional rights. It is in the same category as the pupil assignment laws. They are not inherently unconstitutional. Shuttlesworth v. Birmingham Board of Education, 162 F. Supp. 372, D. C. N. D. Ala., affirmed, 358 U. S. 101, 79 S. Ct. 221, 3 L. Ed. 2d 145. They may serve as an aid to proper school administration. A similar transfer plan was approved by this Court in Kelley v. Board of Education of City of Nashville, 270 F. 2d 209, C. A. 6, cert. denied, 361 U. S. 924, 80 S. Ct. 293, 4 L. Ed. 2d 240. We adhere to our former ruling with the admonition to the board that it cannot use this as a means to perpetuate segregation. In Boson v. Rippy, supra, the court said, 285 F. 2d at p. 46, the transfer feature "should be stricken because its provisions recognize race as an absolute ground for the transfer of students,

and its application *might* tend to perpetuate racial discrimination." (Emphasis added.) This transfer provision functions only on request and rests with the students or their parents and not with the board. The trial judge retains jurisdiction during the transition period and the supervision of this phase of the reorganization may be safely left in his hands (301 F. 2d 164, 168).

***Maxwell* Case**

With regard to the transfer plan, the Superintendent of Schools agreed that the effect of the rule is to permit a child or his parents "to choose segregation outside his zone but not to choose integration outside of his zone" (R. 219); that the provision was identical to that in the Nashville plan (*Ibid.*); and that as it operated in Nashville and was intended to operate in Davidson County, white pupils were not actually required to first go to the Negro schools in their zones and then seek transfers out, and no Negro pupils who did not affirmatively seek a transfer to an integrated school were assigned to one (R. 219-220).

Dr. Eugene Weinstein, a professor at Vanderbilt University in Nashville, testified about a survey of the attitudes of Negro parents in Nashville who had a choice of whether to send their children to desegregated schools. He indicated that the most frequent factor influencing those who did not send their children to white schools was an unwillingness to separate several children in a family where they had older children not eligible for desegregation under the grade a year plan (R. 222-223). He said the experience in Nashville indicated "mass paper transfers of Whites back into what is historically the White school, of Negroes remaining in what is historically the Negro school"; and that the transfer provisions tend to keep the system oriented

toward a segregated system with token desegregation (R. 226).

Six of the plaintiffs in this case reside nearer to all-Negro schools than to white schools (R. 230 Finding No. 5).

At a further hearing held January 10, 1961, on plaintiffs' motions following the initial approval of the plan with modifications, the evidence indicated that under the new zones adopted under the plan, in the first four grades, there were 288 white children in the Negro school zones and 405 Negro children in the zones of the white schools (R. 252). The school authorities sent notices to the parents of these children asking them to indicate within three days whether they requested permission for the children to stay at the school presently attended or requested permission for a "transfer" to the newly zoned school (R. 247-250). Of this group, only fifty-one pupils, all of them Negroes, asked to attend the school in the new zones (R. 265).

As previously indicated the District Court approved the transfer feature of the plan (R. 242). On appeal the Sixth Circuit also approved this provision on the authority of its decision in *Goss* (301 F. 2d at 829). (R. 284).

Argument

This case presents issues of the constitutionality of substantially identical provisions in desegregation plans adopted by two public school boards in response to directions that they present plans to comply with *Brown* v. *Board of Education*, 347 U. S. 483 and 349 U. S. 294. In the second *Brown* decision the Court directed District Courts "to consider the adequacy of any plans" which school authorities might propose "to effectuate a transition to a racially nondiscriminatory school system" (349 U. S. at 301). Subsequently, in *Cooper* v. *Aaron*, 358 U. S. 1, the

Court unanimously reaffirmed *Brown*, stating that state authorities were "duty bound to devote every effort toward initiating desegregation and bring about the elimination of racial discrimination in the public school system" (358 U. S. at 7).

The plans for desegregation in the cases at bar provide for gradual transition on a grade-by-grade basis for a new system for determining the initial placement of pupils. Under the plans, this is to be accomplished by a geographic method of placing pupils according to residence in desegregated school zones or attendance areas to be determined without reference to race. (See R. 31, ¶¶ 3 and 4 of Knoxville plan and R. 214, ¶¶ 2 and 3 of Davidson County plan.) This plan to change the prior pattern of separate overlapping zones for Negroes and whites is, at least, on its face, consistent with *Brown* which envisioned "revision of school district and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis" (349 U. S. at 300-301).[3] However, the challenged racial transfer provisions of the plans, which become effective at the same time the new zoning program goes into effect on a grade-by-grade basis,[4]

[3] Numerous appellate decisions following *Brown* have condemned the practice which still lingers in many areas of maintaining separate school zones for Negro and white pupils. See, e.g., *Jones* v. *School Board of City of Alexandria*, 278 F. 2d 72, 76 (4th Cir. 1960); *Marsh* v. *County School Board of Roanoke County, Va.*, 305 F. 2d 94, 96 (4th Cir. 1962); *Green* v. *School Board of City of Roanoke*, 304 F. 2d 118, 124 (4th Cir. 1962); *Northcross* v. *Bd. of Education of City of Memphis*, 302 F. 2d 819, 823 (6th Cir. 1962); *Bush* v. *Orleans Parish School Board*, 308 F. 2d 491, 498 (5th Cir. 1962); *Wheeler* v. *Durham City Board of Education*, not yet reported (4th Cir., No. 8643, Oct. 12, 1962); cf. *Norwood* v. *Tucker*, 287 F. 2d 798 (8th Cir. 1961).

[4] The racial transfer provision thus is effective only in the grades "desegregated" under the grade-a-year program, and not in grades which remain under the old program of compulsory segregation by separate racial zones.

operate to continue race as a factor in placing pupils in schools, albeit on a partially optional basis. The racial transfer rule continues a policy of racial discrimination in the assignment of pupils to schools and to the extent that it is used, necessarily works to preserve the racially segregated pattern of schools previously created by state law.[5]

The racial transfer rule (R. 31-32, 214-215) provides that pupils be permitted upon written request to secure transfers from the schools which they would be required to attend under the nonracial zoning plan to other schools. The eligibility of a student to obtain such a transfer is cast in terms of race.

(1) A white student, *qua* white student, can transfer from "a school previously serving colored students only";

(2) a colored student, *qua* colored student, can transfer from "a school previously serving white students only";

(3) any student can transfer from a school "where the majority of students of that school or in his or her grade are of a different race."

Thus the transfer rule is explicitly racial, providing for transfers on the basis of a difference between the race of a transfer applicant and either the race of the pupils whom a school *previously* served, the race of a majority of the

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[5] School segregation was required in Tennessee by the Constitution of 1870, art. 11, sec. 12 and by Tennessee Code of 1955, §§49-3701 to 49-3703. (See text at R. 14-15). The Tennessee Supreme Court held the provisions invalid following *Brown* v. *Board of Education*, *supra*, in *Roy* v. *Brittain*, 297 S. W. 2d 72 (Tenn. 1956).

pupils in the school, or the race of a majority of the students in the transfer applicant's grade level in a given school.*

These transfers on the basis of racial factors operate only in one direction, e.g., toward placing students in schools that formerly served their own race exclusively or schools or classes that have a majority of pupils of their own race. This is the source of the transfer provision's invariable tendency to promote racial separation in schools and of its racially discriminatory impact upon individual pupils. No transfer is granted under this provision which will have the effect of increasing desegregation; every transfer necessarily will have the effect of increasing the size of the majority race group in the schools to and from which pupils are transferred.

The discrimination effected by the provision is equally plain. Under the plan a white child living in the zone of a "Negro school" (i.e., a formerly all-Negro school, or predominantly Negro school, or a school with a Negro majority in the applicant's grade) is given the option of transferring to a "white school." But the plan makes no provision for a Negro child living in the same zone to transfer out to a white school; he must remain in the Negro school. It is a very evident and obvious violation of equal protection to deny a choice to one pupil and grant it to another student similarly situated except for race.

Proponents of the racial transfer rule point to the fact that the plan effects a correlative disparity in treatment based on race in white school zones (where Negro pupils can transfer out, but white pupils cannot), in an attempt to justify the discriminatory denial of transfers to Negroes

* It should be realized that the concept of pupils being *initially assigned* on a nonracial basis and then *transferred* on a racial basis is largely fictitious. In practice, pupils simply choose a school on the basis of race before going to any school (R. 141, 219-220).

living in Negro school areas. It is argued that equal protection is afforded by the plan since some whites are also denied transfers because of their race, and thus there are reciprocal discriminations based on race. Actually, this symmetrical inequality of treatment based on race is familiarly characteristic of racial segregation rules.[7]

Of more relevance is the fact that the racial discriminations in both the Negro and white zones operate to limit desegregation rather than to advance it. Neither a Negro nor a white child is granted a racial transfer to extend desegregation, but either child can obtain one if it will operate to decrease or prevent desegregation.

But, the theory that the correlative discriminations against Negroes and whites in some way "balance" each other does more than merely defy the homily that "two wrongs do not make a right." More fundamentally, it ignores the important constitutional principle that Fourteenth Amendment rights are personal rights.[8] This Court

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[7] After all, a bus segregation law forbids whites from sitting with Negroes or in the back of a bus, just as it forbids Negroes from sitting with whites in the front. But cf. *Browder* v. *Gayle*, 142 F. Supp. 707 (M. D. Ala. 1956), aff'd 352 U. S. 903.

[8] Paradoxically, defenders of school segregation have frequently taken the opposite tack and argued that the personal nature of Negro pupil's rights plus certain statutory administrative remedies limited the relief that a court could grant in school desegregation cases to ruling on the admissions of individual pupils while leaving generally applicable racial assignment policies beyond the reach of the courts. It is submitted that these arguments have been properly rejected since Negro children's right to education in a nonsegregated school system can be protected only by removing racially discriminatory rules which apply to all members of the racial group segregated by state authorities. See, for example, *Branson* v. *Board of Trustees of School District No. 1 of Clarendon County, S. C.*, 4th Cir., No. 8727, December 7, 1962 (reversing an order dismissing as to all plaintiffs but the first one named in the complaint); *Wheeler* v. *Durham City Board of Education*, 4th Cir. No. 8643, decided October 12, 1962 (re-

emphasized this in rejecting an argument that a racial restrictive covenant on land enforced against Negroes was valid since state courts would enforce similar covenants against white occupancy, in *Shelley* v. *Kraemer*, 334 U. S. 1, 22:

> But there are more fundamental considerations. The rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights. [Footnote citing McCabe v. Atchison, T. & S. F. R. Co., 235 U. S. 151, 161; Missouri ex rel. Gaines v. Canada, 305 U. S. 337; Oyama v. California, 332 U. S. 633.] It is, therefore, no answer to these petitioners to say that the courts may also be induced to deny white persons rights of ownership and occupancy on grounds of race or color. Equal protection of the laws is not achieved through indiscriminate imposition of inequalities.

See also, *Brown* v. *Board of Education*, 349 U. S. 294, 300; *Sweatt* v. *Painter*, 339 U. S. 629, 635; *Sipuel* v. *Board of Regents*, 332 U. S. 631, 633, treating the rights involved here as personal.

The appellate decisions which have dealt directly with the issue presented here are *Boson* v. *Rippy*, 285 F. 2d 43, 47 (5th Cir. 1960) and *Dillard* v. *School Board of City of Charlottesville, Va.*, not yet reported (4th Cir., No. 8638, decided Sept. 17, 1962), which held the racial transfer plan

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versing a trial court which had denied all relief on the ground that plaintiffs "simply want nothing more or less than a general order of desegregation"); *Jackson* v. *School Board of City of Lynchburg*, 201 F. Supp. 620, 625-629 (W. D. Va. 1962) (rejecting such an argument), rev'd in part on other grounds, not yet reported (4th Cir., No. 8722, Sept. 28, 1962). See also *Green* v. *School Board of City of Roanoke, Va.*, 304 F. 2d 118, 124 (4th Cir. 1962).

invalid, and the three decisions of the Sixth Circuit which upheld the transfer system, e.g., *Kelley* v. *Board of Education*, 270 F. 2d 209, 228 (6th Cir. 1959), and the two cases now being reviewed, *Goss* v. *Board of Education*, 301 F. 2d 164, 168 (6th Cir. 1962), and *Maxwell* v. *County Board of Education*, 301 F. 2d 828, 829 (6th Cir. 1962).[9]

The decision in *Boson* v. *Rippy*, *supra*, emphasized that the plan embodied racial classifications for transfer which the court deemed "hardly less unconstitutional than such classification for purposes of original assignment to a public school" (285 F. 2d 48). In the *Dillard* case, *supra*, the majority held the racial transfer device invalid stating that "the purpose and effect of the arrangement is to retard integration and retain the segregation of the races" and that this "can hardly be denied." The Court ordered 17 Negro pupils admitted to a white school outside their zone of residence since white pupils in the zone were granted such transfers.

In *Kelley* v. *Board of Education*, 270 F. 2d 209, 228 (6th Cir. 1959), the Sixth Circuit upheld the racial transfer provision as it did in the cases at bar. The Court in *Kelley* held that it was permissible to allow a parent to "voluntarily choose a school where only one race attends" (270 F. 2d at 229), but did not discuss the fact that the option to transfer was conferred and denied on the basis of race or the

[9] Among District Court opinions dealing with the issue are *Mapp* v. *Board of Education of City of Chattanooga, Tenn.*, 203 F. Supp. 843, 853 (E. D. Tenn. 1962), appeal pending (transfer plan held invalid on authority of *Boson* v. *Rippy*, *supra*; the court declined to follow *Kelley* v. *Board of Education* stating that the primary purpose of the transfer rule was to prevent or delay desegregation); *Jackson* v. *School Board of the City of Lynchburg, Va.*, 203 F. Supp. 701, 704-706 (W. D. Va. 1962), appeal pending (transfer rule held valid); *Thompson* v. *County School Board of Arlington County*, 204 F. Supp. 620, 625-626 (E. D. Va. 1962), appeal pending (transfer plan held valid; injunction dissolved).

asserted tendency of the rule to preserve segregation. The Court remanded leaving open to plaintiffs only the right to show that there were "impediments to the exercise of a free choice" (270 F. 2d at 230). The *Kelley* decision relied primarily upon *Briggs* v. *Elliott*, 132 F. Supp. 776 (E. D. S. C. 1955), which is discussed in detail in the footnote below.[10]

In the *Goss* opinion (301 F. 2d at 168; R. 162-163), the Sixth Circuit adhered to the result reached in *Kelley, supra*, but attempted to qualify its approval of the plan by stating that while it was "not inherently unconstitutional" it might be unconstitutional as applied and that it was approved "'subject to it being used for proper school administration purposes and not for the perpetuation of segregation" (301 F. 2d at 168; R. 163). The Court in *Goss* also attempted to distinguish *Boson* v. *Rippy, supra*, by mentioning that the transfer rule functioned only upon the request of students or parents and not the school board, and that supervision might safely be left in the hands of the trial judge who retained jurisdiction. Petitioners submit that there is no distinction at all since both factors obtained in *Boson* v. *Rippy* as well.

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[10] *Briggs* v. *Elliott*, 132 F. Supp. 776 (E. D. S. C. 1955), was an opinion rendered by a three-judge court that considered this case (which was one of those consolidated with *Brown* v. *Board of Education, supra*), on remand following this Court's decision in May 1955. The opinion was announced from the bench at the beginning of the hearing as the form of an order to be entered in accord with this Court's mandate. No issue relating to any specific proposal or plan for desegregation was before the Court. The *Briggs* opinion attempts to state what this Court did not decide in *Brown*, and stressed that court's view as to the legality of "voluntary segregation," though in general terms and without any attempt to define what would constitute "voluntary segregation." Certainly, nothing in *Briggs* could undercut this Court's unanimous declaration in *Cooper* v. *Aaron*, 358 U. S. 1, 7, that school officials are "duty bound to devote every effort toward initiating desegregation."

Beyond this, the court's seeming qualification of its approval of the plan is illusory since it did not indicate under what conditions it would ever consider racial transfers improper. Nor is it evident how the trial court's retention of jurisdiction is thought to afford any safeguard since no standards for judging the application of the plan are provided. Moreover, there is no hint in the record that the transfer provision was ever considered by the Court of the parties as a temporary transitional device. Indeed, if it had been so proffered at trial, the Court of Appeals, as a matter of consistency, should have rejected it as inadequate on the same ground the grade-a-year feature was rejected, i.e., that the defendants had not sustained their burden of establishing that the plan was consistent with good faith compliance at the earliest practicable date by evidence of legitimate obstacles to desegregation as contemplated by *Brown* v. *Board of Education*, 349 U. S. 294, 300-301 (301 F. 2d at 166-167; R. 158-162).

There are, of course, further compelling reasons why the racial transfer is inappropriate even as an interim device. It does not suppress racial discriminations or "preclude their revival" (Cf. *United States* v. *Crescent Amusement Co.*, 323 U. S. 173, 188 (1944)); rather, it continues racial discrimination in a slightly different form. It bears no rational relationship to solving any school administrative problem relevant to the proper granting of delay in desegregation. Indeed, it is more likely to aggravate administrative problems by disturbing the efficacy of school zones in properly distributing pupils among schools in relation to capacity. Certainly it encourages, and, indeed, renders more plausible, an effort to manipulate school zone lines on a racial basis. This is true since in a given school zone established on the basis of student population and school capacity, if sufficient numbers of pupils of a minority race are

transferred out, the authorities will be justified in expanding the school zone to include more members of the majority race (who cannot transfer out) in order to fully utilize the available space in the school. That this is a real and not a highly suppositious possibility is amply demonstrated by the New Rochelle, New York school system where this sequence of events occurred. See *Taylor* v. *Board of Education of the City of New Rochelle*, 191 F. Supp. 181, 184-185 (S. D. N. Y. 1961), appeal dismissed 288 F. 2d 600 (2nd Cir. 1961); 195 F. Supp. 231 (S. D. N. Y. 1961), aff'd 294 F. 2d 36 (2nd Cir. 1961), cert. den., 368 U. S. 940.

Indeed, in the *Taylor* case, *supra*, the Court went beyond condemning a practice like that here. It held that where school officials had once permitted white children to transfer out of a Negro school zone but abandoned this practice in 1949, and had manipulated school zone lines on a racial basis, the school board was still under a duty to afford Negro pupils in the school zone thus created an opportunity to transfer to other schools.

Furthermore, the Sixth Circuit's comparison of this racial transfer rule with pupil assignment laws, e.g., as in *Shuttlesworth* v. *Birmingham Board of Education*, 162 F. Supp. 372 (N. D. Ala. 1958), aff'd on limited grounds, 358 U. S. 101, and *Carson* v. *Warlick*, 238 F. 2d 724 (4th Cir. 1956), is not at all apt, for the pupil placement laws conspicuously did *not* maintain race as a factor for determining transfers. The clearest holdings that racial considerations may not be used in determining either pupil transfers or initial placements may be found in various cases involving improper application of pupil placement laws. See, for example, *Norwood* v. *Tucker*, 287 F. 2d 798 (8th Cir. 1961); *Mannings* v. *Board of Public Instruction*, 277 F. 2d 370 (5th Cir. 1960); *Green* v. *School Board of City of Roanoke*, 304 F. 2d 118 (4th Cir. 1962); *Marsh* v. *School Board of*

Roanoke County, 305 F. 2d 94 (4th Cir. 1962); *Wheeler* v. *Durham City Board of Education*, not yet reported (4th Cir., No. 8643, Oct. 12, 1962).

The use of racial factors to determine school assignments has not and cannot be justified as reasonably related to any legitimate governmental objectives. The classification of school buildings on the basis of the race of the pupils formerly occupying them is truly bizarre. Professor Charles Black has observed that: "A small proportion of Negro 'blood' puts one in the inferior race for segregation purposes; this is the way in which one deals with a taint, such as a carcinogene in cranberries."[11] By the racial transfer rule the "taint" has been transferred to buildings, rendering even a *formerly* all Negro school so unfit for white children as to justify the special provision. This serves no legitimate state purpose.

The racial majority rule is similarly unrelated to any proper governmental objective. It is passionately defended by some as the means of protecting a sole tiny child from disastrous imaginary personal consequences upon being thrust unwilling, as the lone member of his race, into a hostile class, when actually the provision permits transfers by pupils in any school or class where there is not a providential exact mathematical equality between the number of pupils of each race. The school authorities have argued that the provision is necessary to protect pupils in a small minority from maladjustments or emotional harm upon being placed in a hostile environment. No such blanket racial rule as this is needed to provide transfers for truly maladjusted children, if transfers are indicated, and the school authorities have an inherent and unchallenged power to grant transfers based on individual hardships and other

[11] Black, "The Lawfulness of the Segregation Decisions," 69 Yale L. J. 421, 426 (1960).

educationally acceptable standards unrelated to preservation of the segregation system.

This Court held in *Bolling* v. *Sharpe*, 347 U. S. 497, that "Classifications based solely upon race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect." The Court went on to find segregation in public education to be "not reasonably related to any proper governmental objective" and a deprivation of liberty in violation of due process. Plaintiffs respectfully submit that the racial classifications made by the school authorities in this case are equally unconstitutional and that the defendants should be required to institute a truly nonracial system of determining the placement and admission of pupils in schools.

CONCLUSION

For the foregoing reasons, it is submitted that the judgments of the court below should be reversed.

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